Supreme Court, U.S.
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No. 98-941

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

CRESCENT TOWING & SALVAGE COMPANY, INC.
and E. N. BISSO & SON, INC.,

Petitioners,

vs.

ORMET CORPORATION and THE GREATER
BATON ROUGE PORT COMMISSION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE LOUISIANA SUPREME COURT

BRIEF IN OPPOSITION FOR RESPONDENT ORMET CORPORATION, NOW KNOWN AS ORMET PRIMARY ALUMINUM CORPORATION

ERNEST L. EDWARDS, JR.
RICHARD B. FOSTER
Counsel of Record
LEMLE & KELLEHER, L.L.P.
Attorneys for Respondent
Ormet Corporation, now known as Ormet
Primary Aluminum Corporation
601 Poydras Street, Suite 2100
New Orleans, Louisiana 70130-6097
(504) 586-1241

150827

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

37pp

QUESTION PRESENTED

The Greater Baton Rouge Port Commission ("Port Commission") owns a marine terminal facility on the Mississippi River which it has leased to respondent, Ormet Primary Aluminum Corporation ("Ormet") since 1973. The facility is equipped to transfer cargo between ships, barges and railcars. Harbor tugs are ordinarily used to assist ships docking at the terminal. In 1995, Ormet began requiring ships to use its dedicated tugs. Ormet subcontracted with a competitor of the petitioners to provide the tugs. Ormet does not use petitioners' tugs. In response to petitioners' complaints, the Port Commission concluded that these arrangements did not violate Ormet's lease from the Port Commission, and it took no further action. Do the actions of Ormet or the Port Commission violate the Commerce Clause?

LIST OF PARTIES

Petitioners, Crescent Towing & Salvage Company, Inc. and E. N. Bisso & Son, Inc.

Stewart F. Peck, Esq.
Scott R. Wheaton, Jr., Esq.
David B. Sharpe, Esq.
Lugenbuhl, Burke, Wheaton, Peck, Rankin
& Hubbard
601 Poydras Street, Suite 2775
New Orleans, LA 70130-6027
Telephone: (504) 568-1990

Respondent, The Greater Baton Rouge Port Commission

Stephen W. Glusman, Esq.
Glusman, Moore, Arbour, Broyles & Glusman
701 North Street
Baton Rouge, LA 70802
Telephone: (504) 387-5551

Respondent, Ormet Primary Aluminum Corporation

Ernest L. Edwards, Jr., Esq.
Richard B. Foster, Esq.
Lemle & Kelleher, L.L.P.
601 Poydras Street, Suite 2100
New Orleans, LA 70130-6097
Telephone: (504) 586-1241

The named respondent, Ormet Corporation, was renamed Ormet Primary Aluminum Corporation prior to suit and has appeared under the latter name throughout the proceedings. Its parent company, Oralco, Incorporated, was also renamed and is now known as Ormet Corporation. There are no nonwholly owned subsidiaries of either corporation.

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Appendix A — Opinion of Chief Administrative Law Judge Norman D. Kline dated April 30, 1998 in the matter of *River Parishes Company, Inc. v. Ormet Primary Aluminum Corporation*, F.M.C. Docket No. 96-06 ..... 1a

STATEMENT OF THE CASE

The material facts of this case are straightforward. The Board of Commissioners of the Port of Baton Rouge ("Port Commission") owns a marine terminal on the Mississippi River at Burnside, Louisiana. Ormet Corporation ("Ormet") owns an alumina plant next door to the terminal. R. 181. (References to page numbers preceded by "R." are references to the record.) The terminal was built to serve the raw material needs of the alumina plant. R. 340, 356-357, 367. Pursuant to its statutory authority, the Port Commission has leased the terminal to Ormet for its own use as well as to operate as a public terminal to the extent that the terminal's capacity is not required to bring materials to and from Ormet's adjacent Alumina Plant. (Exhibit P-1, Addendum 4, pp. 2-3). The lease further provides that Ormet as lessee shall establish all rules, regulations, tariffs and charges for the terminal, which the Port agrees will be approved if they are competitive or supported by Ormet's sound business judgment. (Exhibit P-2, Addendum No. 8, p. 1).

When not being used to handle raw materials for Ormet's plant, the terminal serves shippers of bulk cargos who have a need for a terminal to handle their goods to and from ships, barges, railcars, etc. R. 210, 351-352. The terminal includes a dock and a nearby mooring buoy system for ships bringing cargo to and from the terminal. R. 206-07, 351, 356. It is one of over 150 terminals and ship loading facilities on the river from Baton Rouge to below New Orleans. Tugs are used at all of these locations.

In connection with ships, the terminal provides various services including cargo stevedoring, line handling, shifting at the dock, derrick barges, barge fleeting and shifting, and fresh water. Ormet charges for all of these services pursuant to rates established in its tariff or in individual letter agreements. R. 208-09. Most of these charges are at flat rates applicable equally to all users. Stevedoring rates are negotiated and vary from cargo to cargo.

R. 223-25. None of the rates and charges for these services has ever been regulated by the Port Commission, nor has the Port Commission ever regulated rates and charges of any of the numerous facilities it leases to private concerns. R. 335, 358.

On May 1, 1995, the terminal began providing tug service for the ships docking at the facility. As of that date, ships docking at the terminal have been required to use tugs provided by the terminal to assist their docking maneuvers. Flat rates were established by Ormet for the tug service which are charged equally to all ships using the tugs, and which are competitive with the prevailing "discounted" rates charged by all tug companies in the area. R. 384, Exhibits P-5, P-6 and P-7. For example, Ormet's charge for one tug for one ship docking maneuver, either in or out, is $1,450.00 no matter how large or small the ship may be. The standard "tariff" charge for the same service established by all four tug companies for a ship of 4,000 gross register tons (grt) was $1,750.00 in 1995. R. 380, 383, 397, Exhibits P-5, P-6 and P-7. In addition, per their tariffs, each tug company (but not Ormet) charged an additional $13.00 as a "tonnage charge" based on the weight of the ship over 4,000 grt. R. 381, 383, Exhibits P-5, P-6 and P-7. For each 1,000 gross register tons over 4,000 grt, the ship is charged an extra $13.00 under the tug company tariffs. R. 382.

Thus, the standard tariff rate by the tug companies for a ship of 10,000 grt was $1,828.00 per tug. This was computed as $1,750.00 for the basic 4,000 grt, plus $78.00 for the 6,000 extra grt (6 x $13.00 = $78.00). A 20,000 grt ship would be 16,000 grt over the basic rate and would be charged an extra $208.00 (16 x. $13.00) for a total of $1,958.00. The total rate for a 30,000 grt ship was $2,088.00. Exhibits P-5, P-6 and P-7.

Generally, the tug companies discount these standard tariff rates by an average of about 25%. R. 384. Applying a 25% discount to the standard tug company rates results in an average discounted charge per tug as shown in the following table:

Ship Size	Tug Company Tariff Rate	Tug Company Discounted Rate	Ormet Rate
10,000 grt	$1,828	$1,371	$1,450
20,000 grt	1,958	1,468	1,450
30,000 grt	2,088	1,566	1,450

Charles Andrews, the president of one of the petitioners, Crescent Towing & Salvage Co., Inc. ("Crescent"), in fact admitted at trial that Ormet's tug rates were not higher than his own company's discounted rates. R. 433. In addition, Channing Hayden, the president of the New Orleans Steamship Association, a group of shipowners and agents, testified that tug companies had been charging ships $1,400 to $1,500 per tug at the terminal in comparison with Ormet's charge of $1,450. R. 324.[1] While the petitioners continue to claim that Ormet's tug charges are higher than their own, it should be noted that this directly contradicts the testimony of their own witnesses, Messrs. Andrews and Hayden. (See above.)

Since Ormet's tug service was instituted, ships have no longer been permitted to choose any tug company, as they had done in the past, but are required to use the tug service provided by the terminal. R. 188. The terminal began requiring use of its tugs for several reasons. Terminal management sought to improve the terminal's efficiency and safety and to make a profit on the service as well. Delays had been encountered in the past because of tug unavailability, and management also believed that tugs could contribute to avoiding damage to the dock. Management's prior experience at a competing terminal, IMT in Myrtle Grove, had shown that similar delays and damage were avoided when that terminal required ships to use a single tug company provided by the terminal rather than allowing them to hire anyone they wished. R. 213-14, 219-21.

1. Since this case went to trial in 1995, the tug companies have raised their prices several times. Ormet's charge has remained the same.

In order to provide the required tug service, Ormet sub-contracted with Bisso Towboat Company ("Bisso Towboat"), which one of the four harbor tug companies which operate on the river. Ormet first obtained bids for the tug service from Bisso Towboat and from a competing tug company, E. N. Bisso & Son, Inc. ("E. N. Bisso") (also a petitioner in this action), but elected to go with Bisso Towboat. R. 214. Ormet chose Bisso Towboat on the basis that it offered the lowest price and was willing to provide tugs to Ormet on a non-exclusive contract basis. R. 219. Because the contract provides Bisso Towboat with steady business and economies of scale, it can price its services lower, and Ormet can pass these benefits on to the ships in the form of lower rates.

Pursuant to the contract, Bisso provides five to six tugs at a permanent base it maintains a few miles from the terminal. These pre-positioned tugs, which have permanent crews, provide substantially all of the docking assistance required at the terminal. As a result, the crews are there almost every day, and they become very familiar with local river conditions at the dock to better assist the pilots and captains of the ships. R. 376-77. In addition, the fact that Bisso Towboat's tugs are permanently stationed nearby means that tugs are readily available at all times. If they are late, Bisso Towboat is required to pay Ormet $1,800.00 per *hour* for holding up terminal operations. R. 377.

Ormet's contract with Bisso Towboat provides that Bisso Towboat will render tug services at stipulated rates at Ormet's request. Despite appellants' statements to the contrary, the contract is not, in fact, an "exclusive" franchise—Ormet is not required to use only Bisso Towboat, and the contract specifically provides that Ormet can hire Bisso Towboat, Crescent, E. N. Bisso, or anyone else, at Ormet's option. R. 219-220, 385-86; Exhibit P-4, clause 12, pp. 7-8. In order to obtain the benefits that can be expected from a single company providing the same tugs repeatedly, Ormet has chosen to use Bisso Towboat on all ships that have docked at the terminal. However, Ormet has not extended

Bisso Towboat any rights to be the sole tug company. R. 220; Exhibit P-4, clause 12.

The service physically rendered by harbor tugs at the terminal is as follows. As a ship arrives in the vicinity of the terminal, the tugs (which have previously been advised of the ship's ETA) come alongside the ship and make fast to it as directed by the ship's pilot. The ship, which is under the command of its captain and assisted by a river pilot, then proceeds to the dock. As the ship approaches the dock, the tugs provide extra power and maneuverability to the ship as required under the direction of the ship pilot. The tugs continue to assist under the pilot's orders as the ship comes into contact with the dock, and the terminal line handlers secure the ship's mooring lines. After the ship is fully secured, the tugs are released by the ship. The same process takes place in reverse when the ship departs. R. 264-65. These are dangerous procedures because the full weight of the ship must land against the dock and hold on in the river current.

Since May 1, 1995, the aforementioned tug service has been rendered by Bisso Towboat at the terminal without any delays due to unavailability of tugs, and without any docking incidents. No one has complained about either the adequacy of Ormet's tug services or their price. R. 221-22, 378. However, the petitioners in this case, the three harbor tug companies that did not obtain Ormet's business, all complained about the new service. All three objected to the Port Commission and to Ormet, as did several steamship agents. Upon receipt of these objections, the Port Commission inquired with Ormet about its tug service, raised a number of legal issues, and requested information. (Exhibit P-18). Ormet's counsel replied to the legal issues a few days later, (Exhibit P-19) and then the Port Commission's counsel made further written inquiry. (Exhibit P-20). In response to this inquiry, Ormet furnished a lengthy explanation of the details and objectives of the tug service. (Exhibit P-21).

On June 15, 1995, the matter of the objections was brought up at a meeting of the Executive Committee of the Port Commission. At this meeting, representatives of all three aggrieved tug companies presented their opinions and arguments to the Committee, as did a representative of the New Orleans Steamship Association. Ormet's counsel was also heard, and the committee consulted with the Port Commission's counsel concerning the legal issues involved. After considering all of these matters, the committee concluded that Ormet was not in breach of its lease of the terminal from the Port Commission, and they voted to table further consideration of the objections. R. 337, 347, 353-55.[2]

The petitioners thereafter commenced this suit, demanding that the district court order the Port Commission to reverse its position and vote to declare the Ormet tug service illegal and against public policy. They further requested that the court order that Ormet be prohibited from exercising its existing contract with Bisso Towboat. The district court rejected their arguments and denied their requests for preliminary and permanent injunctive relief.[3] Petitioners have unsuccessfully appealed the denial of their requests for both a preliminary and a permanent injunction to the Louisiana First Circuit Court of Appeals and the Louisiana Supreme Court. The Louisiana Supreme Court granted review solely in regard to petitioners' Commerce Clause challenge. On the merits the court below determined that the Port Commission acted as a market participant and that the actions of Ormet and the Port Commission were neither state regulation nor state action. Accordingly, the Commerce Clause was not violated.

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2. Thus, petitioners' statement that the Port Commission did not review the Bisso Towboat contract is simply incorrect.

3. By stipulation of the parties, the district court ruled on the issue of petitioners' entitlement to permanent injunctive relief on the basis of the transcript and other evidence adduced at the hearing on petitioners' request for a preliminary injunction. R. 157.

SUMMARY OF ARGUMENT

A. The Louisiana Supreme Court properly applied the relevant decisions of this Honorable Court and there are no unsettled issues of law for review.

The Louisiana Supreme Court reviewed the case in respect to the Commerce Clause only. In doing so it followed the analysis of this Court's relevant decisions. The principles it applied included the proposition that the Commerce Clause restricts state regulation of interstate commerce but leaves private actors free of restraint. The court noted that the clause *per se* prohibits state regulation directly discriminating against local interests and that indirect discrimination is prohibited if it imposes an undue burden on commerce. The court also noted, without applying, this Court's analysis for determining the existence of an undue burden. Instead the Court examined whether the state was a "market participant" not acting in its sovereign capacity and should be treated as a private actor under Commerce Clause analysis. Properly applying this Court's decisions, the court below determined that the Port Commission was a market participant and that "state action" was not involved in the actions of either Ormet or the Port Commission. The law of this Court is clear on these issues and was properly applied to the facts by the court below. There is no need for further review.

B. Petitioners reasons for granting a writ are without merit.

1. *The decision of the Louisiana Supreme Court does not conflict with United States Court of Appeals decisions regarding "exclusive franchises".*

Petitioners cited certain cases holding that airports could not grant exclusive rights to certain taxi companies to pick up all passengers at the airports and exclude other taxi companies from

picking up those passengers who had already paid for their airport transfer as part of a package tour. The cases are inapposite. The true airport analogy would compare Ormet to an airport which required arriving airliners to use the airport's tow trucks to come to the gates and prohibited the airliners from supplying their own tow trucks. In addition, the cited cases all involve restrictions directly imposed by the state. In the present case, the state Port Commission has neither compelled nor encouraged Ormet's tug service. It has simply refused to interfere. This does not constitute state regulation.

2. *There is no conflict in the decisions of the Louisiana Supreme Court and the United States Courts of Appeals in the application of the "state action" and "market participant" doctrines in Commerce Clause cases.*

Analysis of the cases cited by petitioners reveals that the cases are very consistent in their characterization of state lessors as "market participants" in regard to leasing state property for commercial purposes. The variations in the cases result from the varying facts necessarily addressed. The Port Commission in this case simply leased its terminal to Ormet and refused to intervene in the tug market. This is market participation, not state regulation.

The court below also analyzed the case under the "state action" doctrine usually found in this Court's decisions concerning fundamental individual rights. The court below correctly concluded that no state action was present under these tests. Respondent submits, however, that such "state action" analysis has never been used in Commerce Clause cases. This is because if state "market participation" is found, the state's actions are permitted by the Commerce Clause, not prohibited. Thus, "state action" analysis makes no difference.

3. *There is no open issue of national importance in this case because Congress has affirmatively acted to impose a regulatory structure on the operations of marine terminals.*

Because marine terminals are important, Congress has taken affirmative action to regulate them under its Commerce Clause powers: the Shipping Act of 1984 and the Federal Maritime Commission. One of the three aggrieved tug companies has filed a petition with the FMC under the Shipping Act claiming Ormet's tug service is unreasonable and prejudicial. An FMC trial was conducted by an ALJ last year in which two full years of Ormet's tug service was examined. Unlike the trial court in this case, the FMC analyzed the actual effect of Ormet's operations. It was not restricted to the parties' prediction of the future as was the trial judge in the injunction hearings in this proceeding. The ALJ found that Ormet's operations were reasonable and economical. A full FMC opinion is due February 3, 1999.

The FMC proceeding thus far indicates that the expert agency charged with regulating marine terminals finds no fault with Ormet. This Court need not intervene where there is established regulatory machinery created by Congress and that machinery is in process of reviewing substantially the activities presented in this case.

4. *Ormet's tug service arrangements do not discriminate against interstate and foreign commerce nor do they burden it.*

There is no discrimination in favor of local interests against out-of-state interests. All parties involved are engaged in interstate and foreign commerce. Petitioners are merely unhappy that another company outbid them for Ormet's work, but the Commerce Clause does not protect individual parties from competition or loss of business. Ormet's tug service does not burden interstate commerce. It is a permissible fee-for-service arrangement and has in fact

provided cheaper tug rates to ships coming to the terminal. This is a benefit, not a burden.

REASONS FOR DENYING THE WRIT

I. THE LOUISIANA SUPREME COURT PROPERLY APPLIED THE RELEVANT DECISIONS OF THIS HONORABLE COURT AND THERE ARE NO UNSETTLED ISSUES OF LAW FOR REVIEW.

The Louisiana Supreme Court reviewed this matter on writ of certiorari solely as to the Commerce Clause issue. In this regard the decision is a model of clarity in the application of this Court's relevant precedents.

The court below began its review by noting that the Commerce Clause on its face empowers Congress "To regulate Commerce with foreign Nations and among the several States . . ." U.S. Const. Art. I, § 8.[4] From the outset, however, the Court also recognized that this grant of power to Congress also limited the power of the states, citing a seminal decision of this Court in a Louisiana case, *Cooley v. Board of Wardens*, 12 How. 299, 18 L. Ed. 996 (1852).

The court below than turned to this Court's decisions setting out the framework for the analysis of state activities under the restrictions of the Commerce Clause. The court below noted the bifurcation of the analysis between state regulations directly discriminating against interstate or foreign trade in favor of local interests, which are virtually *per se* invalid, *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624, 98 S. Ct. 2531, 57 L. Ed. 2d 475

4. The commerce involved in this case is at the intersection of foreign trade (by ships) and interstate commerce (by barges and rail cars). The tugs serve the foreign trade component but the legal analysis is the same for either foreign or interstate trade. For consistency with the majority of the cases which involve interstate commerce, this brief will refer to the commerce in question as "interstate".

(1978), and state regulations indirectly discriminating against interstate or foreign trade, which are invalid only if they impose an undue burden on such trade. *Hughes v. Oklahoma*, 441 U.S. 322, 99 S. Ct. 1727, 60 L. Ed. 2d 250 (1979). The Court also noted this Court's criteria for determining what constitutes an "undue" burden as established in *Hughes*, 441 U.S. at 336, and *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970), which include:

1) whether the challenged action regulates evenhandedly with only incidental effects on interstate commerce;

2) whether the challenged action serves a legitimate local purpose; and, if so,

3) whether there are less burdensome alternatives.

Lastly, the Court pointed out that the Commerce Clause does not apply to burdens imposed by private actors. *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 60 S. Ct. 869, 84 L. Ed. 1108 (1940). The court then referred to the "market participant" rule crafted by this Court which distinguishes between a state's activities as a regulator subject to the strictures of the Commerce Clause, and its proprietary activities as a market participant which are free of restraint as if it were a private party. *Reeves, Inc. v. Stake*, 447 U.S. 429, 100 S. Ct. 2271, 65 L. Ed. 2d 244 (1980); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 96 S. Ct. 2488, 49 L. Ed. 2d 220 (1976). On the other hand, the Court also recognized the principle that a private party's activities could amount to state action if there was a "close nexus" between the private party's action and the state. *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 107 S. Ct. 2971, 97 L. Ed. 2d 427 (1987).

The foregoing decisions of this Court and the principles they embody were the framework of the decision of the Court below, against which it tested the petitioners' claims. The principles relied

upon in each of these decisions are as viable today as when the decisions were rendered and, taken together, provided a complete basis for analysis of the challenged actions.

Using these principles, the court below considered each of the respondent's activities: the Port Commission's lease to Ormet, Ormet's decision to provide exclusive tug services, and the Port Commission's refusal to attempt to prohibit Ormet's actions. In applying the law to the facts, the court below found that the Port Commission was a market participant in competition with other terminals in leasing its terminal to Ormet. It further found that the Port Commission's mere inaction in regard to Ormet's decisions did not constitute state action in the absence of any compulsion or significant encouragement by the Port Commission.

There is abundant evidence to support the facts underlying the Louisiana Supreme Court's decision. The court below having applied the relevant decisions of this court to the facts found, there is no reason to further review either the facts or the law, and the writ ought to be denied. *Roemer, III v. Board of Public Works of Maryland*, 426 U.S. 736, 758, 96 S. Ct. 2337, 2350, 49 L. Ed. 2d 179, 194-95 (1976); Rules of the United States Supreme Court, Rule 10(c).

II. PETITIONERS REASONS FOR GRANTING A WRIT ARE WITHOUT MERIT.

A. The decision of the Louisiana Supreme Court does not conflict with United States Court of Appeals decisions regarding "exclusive franchises".

Petitioners have cited this Court to a number of lower court cases involving taxicab franchises at airports. In these cases, the common thread is that the local airport authority granted an exclusive franchise to a single taxi or limousine service to pick up all arriving passengers. In each case, a competing operator

complained that this arrangement prevented it from providing service to arriving passengers who had already paid for the service as part of their tour packages. The courts held that while the airports could grant a single taxi or limousine operator or group of operators an exclusive franchise to "solicit" arriving passengers, the Commerce Clause prevented them from prohibiting other operators from providing services to those passengers who had already made their arrangements through a prepaid package tour. *Charter Limousine, Inc. v. Dade County Bd. Of County Commissioners*, 678 F.2d 586, 589 (5th Cir. 1982); *Southerland v. St. Croix Taxicab Ass'n*, 315 F.2d 364 (3rd Cir. 1963).

These cases are readily distinguishable from the present situation, and it is misleading to offer them as analogies. The true analogy between an airport and Ormet's terminal would compare the *airliners* at the airport with the ships calling at Ormet's terminal. The airliners bring in their passengers and baggage just as ships bring in their cargos. The airliners "dock" at the airport gates and often require tow trucks to assist them, just as do the ships at Ormet's terminal. If in the cited cases the airport authorities had required the airlines to use the airport's tow trucks rather than letting the airlines hire or provide their own, would the analysis employed and the outcome of those cases be different? It is submitted that it would, particularly if the airliners, like the ships at Ormet, necessarily had to land their full weight against the airport building, metal-to-metal, each time they arrived.

In such a case, the same safety concerns that motivated Ormet to control the tugs at its dock would impel airports to control the docking of arriving airliners. No Commerce Clause issue would arise because it would be a simple fee-for-service arrangement similar to Ormet. *See New Orleans S.S. Assn. v. Plaquemine Port, Harbor & Terminal District*, 690 F. Supp. 1515, 1521-1524 (E.D. La. 1988), *aff'd*, 874 F.2d 1018, *amended*, 891 F.2d 1153, *cert. den.*, 495 U.S. 932, 110 S. Ct. 2172, 109 L. Ed. 2d 502 (1990), and cases cited therein.

An equally great distinction between the taxicab cases and the present situation is the fact that in each of the taxicab cases the actions complained of are the direct acts and/or prohibitions of a state governmental entity. In the present case, the Port Commission has not acted at all except to passively acquiesce in Ormet's decision by refraining from any attempt to prohibit it. Not even the petitioners have argued that Ormet's exclusive tug services were in any way compelled or encouraged by the Port Commission, that the Port Commission derives any revenues or benefits from the new arrangement, or that the Port Commission participates in the exclusive tug services.

Thus, as discussed in more detail in the next section, Ormet's tug service can be fairly characterized as purely private and non-governmental. Although petitioners contend that this makes no difference, it in fact makes all the difference. The petitioners' contention that the Port Commission cannot do indirectly through Ormet what it cannot do directly simply falls flat when there is no evidence that the Port Commission is "doing" anything, and Ormet's tug services are entirely a matter of private commerce neither compelled, encouraged, nor participated in by the Port Commission. Such private action is properly outside the restraints of the Commerce Clause in the absence of any action by Congress to exercise its commerce powers.

B. There is no conflict in the decisions of the Louisiana Supreme Court and the United States Courts of Appeals in the application of the "state action" and "market participant" doctrines in Commerce Clause cases.

Petitioners claim that there is a conflict among the circuits regarding application of the "market participant" doctrine to cases involving states as lessors. This so-called conflict amounts to a single Fifth Circuit case which is contrasted with a single Eighth Circuit case. The Fifth Circuit case, *Smith v. Dept. of Agriculture*

of the State of Georgia, 630 F.2d 1081 (5th Cir. 1980), *cert. den'd*, 452 U.S. 910, 101 S. Ct. 3040, 69 L. Ed. 2d 412 (1981), involved a state-owned farmers market which became so crowded with tenants that the state boldly and expressly excluded its out-of-state tenants in favor of local farmers. This unapologetic assault by the state directly against interstate commerce prompted the Fifth Circuit, in a plurality opinion, to find that the practice was barred by the Commerce Clause. In doing so, the Fifth Circuit analyzed the state's market participant defense in terms of the relevant market—the leasing of booths or the sale of produce. Three opinions resulted. The lead opinion by District Judge Lynne found that the state's role was hybrid—it owned the market but did not participate in buying and selling. He concluded that the state's relevant role was as a market regulator deciding who was permitted to buy and sell. *Id.* at 1083. Judge Gee filed a concurring opinion in what he stated was a "close case", *id.* at 1085, finding that the relevant market was in produce, not sale booths, and that the state was regulating who could sell produce. *Id.* at 1086. (Both Judges Lynne and Gee seem to have been mainly influenced by the fact that the case involved an actual "market".) Dissenting, Judge Randall reached a contrary conclusion and decided that the relevant activity was the leasing of space and that the state was no different than a commercial property owner unrestricted by the Commerce Clause. *Id.* at 1088.

This "close" case, with three opinions from three judges, is contrasted by petitioners with the recent Eighth Circuit case of *Four T's, Inc. v. Little Rock Mun. Airport Commission*, 108 F.3d 909 (8th Cir. 1997), which involved the method of calculation of fees charged to car rental companies for space at a municipal airport. The Eighth Circuit considered the Fifth Circuit's 1981 decision in *Smith*, and found Judge Randall's dissent to be the more persuasive argument, because in the case before the Eighth Circuit the airport's role was more aptly characterized as "a participant in the market for marketplace space". *Id.* at 913. In

other words, in the Eighth Circuit's case, the dispute was more directly concerned with the airport's commercial leasing activities than was the dispute decided by the Fifth Circuit, and the Eighth Circuit addressed the airport's status as a marketplace participant in the context of the commercial real estate market, not the car rental market. The results of the two cases are different simply because facts presented were so different.

The same may be said for the lower court decisions cited by petitioners. For example in *Airline Car Rental, Inc. v. Shreveport Airport Authority*, 667 F. Supp. 303 (W.D. La. 1987), the court addressed an airport-imposed fee on *non-tenant* car rental agencies. Although cited by petitioners as a conflict with the Eighth Circuit in *Four T's, Inc.*, this is entirely misleading. *Airline Car Rental* involves fees and other requirements imposed by the airport on non-tenant car rental companies who occupied no space at the airport. Like the Eighth Circuit, the court actually concluded that the airport had not itself entered the car rental market and thus it concluded that the airport's role in imposing the fees on the non-tenants was that of a market regulator constrained by the Commerce Clause. Also like the Eighth Circuit, the court noted that in regard to the rental car companies that were in fact the airport's tenants, the airport acted in a proprietary capacity free of Commerce Clause restraint. To the same effect is the holding in *Transport Limousine of Long Island, Inc. v. Port Authority of New York and New Jersey*, 571 F. Supp. 576 (E.D. N.Y. 1983) in which airport lessor was held to be a market participant.

Equally misleading is petitioners' characterization of *Air Transport v. City and County of San Francisco*, 992 F. Supp. 1149 (N.D. Cal. 1998), as an airport lessor/market regulator case. In that case, the court considered a city's requirement that all contracts of the city-owned airport include a requirement that the contractor refrain from discriminating against their employees on the basis of sexual orientation *anywhere in the United States*. In answer to

the city's "marketplace participant" defense, the court found that "There is no question that the City is acting as a market place participant . . ." and "when the City enters into contracts . . . it is directly participating in the marketplace by purchasing services or leasing property." *Id.* at 1163. This is precisely contrary to petitioners' description of the case.

The question actually presented in the case was whether the city was improperly reaching "beyond the sphere of economic activity in which it is participating in an attempt to regulate commerce beyond its borders." *Id.* at 1163. The city was obviously doing so, contrary to the dictates of *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 106 S. Ct. 2080, 90 L. Ed. 2d 552 (1986), and the ordinance was struck down.

Here again, however, the treatment of the airport as a lessor and market participant is consistent with the other cases on the subject. It differs in result for no reason other than the city's extra-territorial attempt to impose its will nationwide, a factor absent from the other cases and from this case.

Accordingly, the split of authority claimed by the petitioners is largely illusory. The few courts who have addressed the "market participant" doctrine have all employed the proper precedents and analysis in the decisions. The differences in result are readily attributable to the wide range of facts presented and the fact-intensive nature of the inquiry, but there is a high degree of consistency in the treatment of public bodies as market participants in regard to their leasing activities. The decision of the Louisiana Supreme Court in this case is therefore entirely consistent in its treatment of the Port Commission as a market participant in regard to its lease with Ormet.

For petitioners to contend that the Port Commission should be treated as a market regulator of tug services merely by virtue of its terminal lease to Ormet (a lease which does not even mention

tugs) is totally without legal or factual support. Attempting to characterize Ormet's tug services to the state as "indirect" state regulation of the tug service market falling outside the market participant exception fails for lack of a logical basis in fact. The petitioners cannot on the one hand complain of the Port Commission's refusal to involve itself in Ormet's private tug contracts (which the state could itself enter into as a market participant free of Commerce Clause restraint) as a kind of state regulation of the tug market, and at the same time claim that the same refusal somehow constitutes "indirect state *participation* in the market" that is equivalent to state regulation unprotected by the market participant exception. It is pulling oneself up by the bootstraps to argue that "indirect" state participation in the tug market, merely by leasing a terminal to a company that provides tug services and then refusing to intervene in the tug services, constitutes state regulation of the tug service market. The argument fails because such state activities, when examined directly, are simply not regulation at all. The Louisiana Supreme Court was right when it found the Port Commission to be a market participant, and there is no split of authority requiring this Court's intervention.

Petitioners next attempt to employ the case of *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S. Ct. 856, 6 L. Ed. 2d 45 (1961), to impute Ormet's tug services to the Port Commission as "state action." In *Burton*, of course, the discriminatory practices of a restaurant located in a state-owned and operated parking garage were found to constitute "state action" in the context of a Fourteenth Amendment equal-protection claim. The restaurant's operation was found to be so interdependent and intertwined with the state's parking operation as to make the state a "joint participant" in the restaurant's discriminatory activities such that the latter were effectively state actions proscribed by the equal protection clause.

Although it was not noted by the Louisiana Supreme Court, *Burton*'s holding is of little use in a market participant/state

regulatory context. This is because in *Burton*, the discriminatory actions of the private party were constitutionally prohibited if performed by the state. The characterization of these actions as "state" actions and not "private" actions therefore made a difference. In the context of state market participation versus state regulation under Commerce Clause precedents, the existence of "state action" makes no difference at all. The real question is whether the "state action" is as a market participant or as a market regulator. If the challenged conduct constitutes "market participation" it is not proscribed by the Commerce Clause whether performed by a private party or the state itself.

The point is that even if the Port Commission chose to operate the terminal itself and to provide tug services precisely as Ormet is doing, it would not be a market regulator. Rather, it would be a market participant entitled to the same rights as a private party to determine which tug company it wished to deal with and to fix the terms on which it would provide services to the ships using the terminal. Thus, the imputation of the term "state action" to Ormet's tug services is pointless in the present case because the Port Commission, *i.e.*, the state itself, could permissibly engage in the same activities as a market participant.

The Louisiana Supreme Court did, however, address itself to the "state action" issue and fully discussed *Burton* as well as the more recent case of *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 107 S. Ct. 2971, 97 L. Ed. 2d 427 (1987). The court below noted *Burton*'s instruction that its decision was not to be applied to all state leases, commenting that state action decisions were to be made *ad hoc* by "weighing circumstances." *Burton*, 365 U.S. at 722. The court also noted that this case's only similarity to *Burton* was the fact that both involved a private party leasing a state facility. In point of fact, few, if any, of the factors considered in *Burton* are present here. In *Burton*, this Court described the "peculiar relationship"

of the restaurant to the state's parking facility which conferred mutual benefits to each. The requirement of operating and maintaining the entire building remained with the state. The restaurant guests had the convenience of the state's parking, while the convenience of parking might well provide the restaurant additional guests. Moreover, the Court was cognizant that the restaurant discriminated for the benefit of its business and that the profits from this discrimination were an indispensable element in the success of the state's parking venture. *Id.* at 860.

The factors held to constitute the state as a joint participant in the prohibited conduct in *Burton* are not present here. The Port Commission is Ormet's landlord and little else. The payment of rent is the only significant contact between them. Ormet operates the entire facility. There is no suggestion that any other Port Commission properties or operations are interrelated with Ormet's tug service. Under such circumstances the Port Commission can hardly be characterized as a joint participant in the challenged tug services, and Ormet's private business activities are free of Commerce Clause restraints.

The Louisiana Supreme Court preferred the analysis of *San Francisco Arts* to *Burton*. Under that test, as well, Ormet's tug service passes muster as purely private action. In *San Francisco Arts*, a case much more "commercial" in nature than *Burton*, this Court further explained that state action is not normally found unless the state ". . . has exercised coercive power or has provided such significant encouragement, either overt or covert, that the [action] must in law be deemed to be that of the [government]." *San Francisco Arts*, 483 U.S. at 546. In the present case, the Port Commission's reticence to become involved in this controversy, other than to decide that its lease was not being violated, cannot be fairly described as either compulsion or encouragement of Ormet. Accordingly, Ormet's tug services met the private action test of *San Francisco Arts*, as well as *Burton*. Contrary to

petitioners' assertions, no new rule of "state action" was thus created by the Louisiana Supreme Court. It accurately followed this Court's decisions. To the extent there may be inconsistent case law in this area, as suggested by the petitioners, it would be unfortunate to inoculate this Court's body of Commerce Clause precedents with any such inconsistency.

As may be noted from review of the state action cases cited by petitioners, all involve issues of fundamental individual rights. None involve the Commerce Clause and, so far as respondent can determine, there are no Commerce Clause cases extant that involve state action analysis. This alone would suggest that questions of "state action" are largely irrelevant to the Commerce Clause. The decisive issue is market participant versus market regulator, an issue resolved in the case by the Louisiana Supreme Court following guidance of this Court's precedents.

C. There is no open issue of national importance in this case because Congress has affirmatively acted to impose a regulatory structure on the operations of marine terminals.

Ormet agrees that the ports and terminals of this country are a matter of national importance. Congress has regarded the operations of marine terminals as sufficiently important to affirmatively exercise its Commerce Clause powers and create for them a statutory scheme of regulation, the Shipping Act of 1984, 46 U.S. Appx. § 1701, *et seq.*, and a regulatory agency, the Federal Maritime Commission to enforce the scheme.

Section 1703(b) of the Shipping Act provides that it is applicable to the contracts of marine terminal operators involving ocean transportation in foreign commerce. Section 1709(d) provides that marine terminal operators shall establish reasonable regulations and, by reference to subsections (b)(11) and (12), prohibits terminal operators from giving any unreasonable

preference to anyone or subjecting them to any unreasonable prejudice or disadvantage.

The petitioners herein have carefully refrained from asserting any claim against Ormet or the Port Commission under the Shipping Act; however, the Act has not gone unnoticed. River Parishes Co., Inc., ("RIVCO") the third and smallest of three companies on the river who do not serve Ormet's terminal, asserted a claim with the Federal Maritime Commission ("FMC") under the aforementioned provisions of the Shipping Act, claiming that it was injured by Ormet's exclusive tug services. RIVCO participated in the present case as an intervening plaintiff at the trial level but has focused its efforts on the FMC.

In RIVCO's proceeding with the FMC, a full trial was conducted before Chief Administrative Law Judge Norman Kline to determine the reasonableness of Ormet's exclusive tug services. The trial, conducted during September — November, 1997, allowed the judge to examine not only the facts considered by the state trial judge at the injunction hearing in this proceeding two years earlier, but also the actual effect of Ormet's exclusive tug services on the shipping industry during the following two years. Unlike the state court trial judge, the ALJ was in a position to review historical evidence instead of simply hearing the parties' predictions of the future course of events. (The ALJ's opinion, which is some 112 pages in length has been submitted to the Court as a lodging appendix contemporaneously with this brief.)

In his decision, the ALJ considered, among other things, the relationship of the Port Commission and Ormet, the details of Ormet's exclusive tug services and the reasons for instituting them, the reasonable cost of Ormet's service compared to the other tug companies, and its effect on the shipping business in Baton Rouge. His conclusion was that Ormet's exclusive tug service was justified, economical and neither undue nor unreasonable under the aforementioned provisions of the Shipping Act.

RIVCO has appealed from the ALJ's decision to the full FMC which heard oral argument on October 28, 1998. The FMC has since issued written notice that its opinion will be handed down on February 3, 1999.

The FMC's proceedings are significant to petitioners' writ application in several respects. First, the proceedings belie petitioners' rhetoric that Ormet's tug services are a "cancer" that will spread unfettered through "the national economic body" unless restrained by this Court under the Commerce Clause. To the contrary, Ormet's practices are presently being scrutinized by the regulatory agency that Congress, in the affirmative exercise of its Commerce Clause powers, has entrusted with such oversight.

Secondly, the FMC proceedings have involved considerably more evidence, primarily consisting of over two years of actual operations of Ormet's tug service, than is available to this Court on the record of this case. This Court need not and ought not act in a Commerce Clause matter, the primary responsibility for which Congress has delegated to the FMC and which the agency is actively considering. While respondents have not raised any issue of primary jurisdiction in this case in order to reach the numerous state law claims raised by petitioners in the courts below, it is submitted that as the case now stands the Court should be cognizant of the FMC's ongoing review.

Lastly, the ruling of the ALJ is important because as the first round of review by the expert agency charged with regulation of marine terminals, it represents a considered decision of Ormet's tug service and its impact on the shipping industry in general and, in particular, on the smallest of the competing tug companies. Strong consideration should be given to these findings as they represent an approval of Ormet's tug service by an expert fact-finder.

D. Ormet's tug service arrangements do not discriminate against interstate and foreign commerce nor do they burden it.

Although the petitioners have claimed that Ormet's lease and tug contract discriminate against interstate commerce, this claim is mere argument. No discrimination of any kind in favor of local commerce has been shown. All of the parties are engaged in one way or another in the stream of interstate and foreign commerce. Petitioners' claim that shipowners can no longer hire tugs of their choice does not raise a question of discrimination against interstate commerce, as all shipowners are treated alike and there is no evidence that local shipowners (if there are any) receive a preference. In point of fact, the shipowners receive the benefit of lower tug rates, a reality which probably accounts for the notable absence of any complaining shipowners in this case.

The petitioners' claim that they themselves are impacted also fails to state a claim under the Commerce Clause when they only allege they have been excluded in favor of another tug company and fail to allege how this impermissibly favors local interests to the detriment of interstate commerce.

The important point is that all the parties are engaged in interstate and foreign commerce. It was recognized over a hundred years ago that tugs assisting ships engaged in foreign or interstate commerce are themselves operating in such commerce. *Moran v. City of New Orleans*, 112 U.S. 69, 5 S. Ct. 38, 28 L. Ed. 653 (1884). Similarly, terminals are engaged in interstate and foreign trade. *St. of Cal. v. United States*, 320 U.S. 577, 586, 64 S. Ct. 352, 357, 88 L. Ed. 322, *reh. den.*, 64 S. Ct. 516, 321 U.S. 802, 88 L. Ed. 1089 (1944). Thus, Ormet and Bisso Towboat are equally operating in interstate and foreign commerce equally with Crescent and E. N. Bisso, and no favoritism for "local" interests has been shown.

In point of fact, the appellants' real complaint is that they have been discriminated against when the dock's business is contracted to a competing tug company. However, the Commerce Clause does not protect them from such competition. Rather, "the Commerce Clause protects the interstate market, not individual firms, from prohibitive or burdensome regulations." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-128, 98 S. Ct. 2207, 2214-15, 57 L. Ed. 2d 91 (1978); *Wood Marine Service, Inc.*, 858 F.2d 1061 (5th Cir. 1988). "Interstate commerce is not subjected to an impermissible burden simply because an otherwise valid regulation causes some business to shift from one interstate supplier to another." *Exxon*, 437 U.S. at 127. The Commerce Clause does not concern "the particular structure of methods of operation in a retail market." *Id.* Private parties such as Ormet are free to create new and efficient business structures without Commerce Clause restraint and subject only to Congress' regulatory power. Accordingly, neither the appellants' individual right to seek tug business serving Ormet's dock, nor the fact that they are excluded from the tug business at Ormet's terminal in favor of a competing tug company, raises a claim under the Commerce Clause. *Wood Marine Service*, 858 F.2d at 1065-1066.

Similarly, Ormet's tug service is not a burden on commerce. On the contrary it is a benefit. The ships calling at the dock benefit from the increased safety of Ormet's dedicated tugs and Ormet's lower rates. As an example, Charles Andrews, president of petitioner, Crescent, testified that Ormet's tug rates were *not* higher than his own. When questioned by his own lawyer, he stated:

> Q: Now are you aware of the present rates being charged for tugs by Ormet?
>
> A: Yeah, I have seen—I have seen the printed sheet.
>
> Q: Are these rates higher than what Crescent would charge?
>
> A: No.

R. 433. Petitioners also called Channing Hayden, president of the New Orleans Steamship Association, an organization of shipowners and agents, as a witness. He testified that ships were being charged $1,400 to $1,500 by the tug companies to dock at the terminal in comparison with Ormet's charge of $1,450. R. 324. Clearly, Scott Slatten, vice president of Bisso Towboat, was correct when he testified that Ormet's price was "highly competitive." R. 384.[5] This, of course, was as matters stood in 1995. Since then, the tug companies' rates have gone up several times while Ormet's stayed the same, as the ALJ noted in the parallel FMC proceeding.

Lastly, it must be pointed out that the activity complained of is a fee-for-service arrangement. According to the evidence adduced at trial, Ormet requires ships calling at the terminal to use its tugs for docking and then sub-contracts the tugs from one of appellants' competitors. R. 188. This dispute concerns only who is entitled to render the service and receive the tug fees. There is no evidence in this case that shipowners are being charged unreasonable rates for tug service at the terminal. On the contrary, the evidence is that the flat rates charged by Ormet are competitive with or less than the "discounted" rates charged by the other tug companies. R. 324, 377, 384, 433; Exhibits P-5, P-6, and P-7. Reasonable fee-for-service arrangements like this do not implicate the Commerce Clause. The Supreme Court has consistently refused to construe fee-for-service arrangements as impermissible burdens on interstate commerce. *See New Orleans S.S. Ass'n. v. Plaquemine Port District*, 690 F. Supp. 1515, 1521-1524 (E.D. La. 1988), *affirmed*, 874 F.2d 1018, *amended*, 891 F.2d 1153, *cert. denied*, 495 U.S. 932, 110 S. Ct. 2172, 109 L. Ed. 2d 502 (1990), and cases cited therein.

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5. It is unclear how the Louisiana Court of Appeal concluded that Ormet's charges were "undoubtedly higher". The court apparently overlooked the effect of the tonnage charge and the testimony of Andrews and Hayden. The Louisiana Supreme Court, however, took note that Ormet's charges were competitive.

CONCLUSION

For the reasons set forth above the petition for writ of certiorari should be denied.

Respectfully submitted,

ERNEST L. EDWARDS, JR.
RICHARD B. FOSTER
Counsel of Record
LEMLE & KELLEHER, L.L.P.
Attorneys for Respondent
Ormet Corporation, now known as
Ormet Primary Aluminum Corporation
601 Poydras Street, Suite 2100
New Orleans, Louisiana 70130-6097
(504) 586-1241